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Bilateral Investment Treaties, Holdout Investors, and Their Impact on Grenada's Sovereign Debt Crisis

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Bilateral Investment Treaties, Holdout Investors, and their Impact on Grenada's Sovereign Debt Crisis

Alison Wirtz*

Abstract

In response to sovereign debt defaults in recent years, investors have pursued a number of novel legal strategies in national courts and international tribunals to maximize their payouts from the defaulted bonds. Many developing countries that raise capital through the issuance of sovereign debt have also entered into Bilateral Investment Treaties (BITs) with the U.S. and other developed countries. BITs encourage foreign investment in developing countries by providing certain protections for investors, which in turn lower the risk of the investment. In the event of a dispute with a foreign investor, BITs typically provide that the parties may file suit in a designated forum, often the International Centre for the Settlement of Investment Disputes (ICSID). Recently, investors have refused to participate in countries' restructuring efforts and instead used BIT claims to try to extract higher payouts from defaulted bonds through ICSID proceedings. Greater ICSID involvement in sovereign debt restructuring is problematic; it is likely to increase the cost of raising capital through sovereign debt issuances and the costs of restructuring for insolvent countries.

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I. INTRODUCTION

In the wake of the 2009 global financial crisis a number of countries, including Greece, Belize, Jamaica, and Grenada have engaged in sovereign debt restructuring activities.¹ Greece has undertaken the largest debt restructuring campaign in the world to date.² Grenada has been dragged into the U.S. court system by the Export-Import Bank of the Republic of China (Ex-Im Bank).³ Argentina has been engaged in a decade-long struggle with investors who pursued litigation and international arbitration rather than settle under the terms of the offered restructuring agreement.⁴ Other countries face severely impaired credit ratings as well.⁵ These recent situations highlight the importance of understanding the potential mechanisms for seeking redress in the event of a sovereign debt default.

Many of the countries raising capital through the issuance of sovereign debt have also entered into Bilateral Investment Treaties (BITs) with the U.S. and other countries.⁶ BITs encourage foreign investment in developing countries by providing certain protections for investors, which in turn lower the risk of their investment.⁷ BITs typically provide that in the event of a dispute between a state and a foreign investor, the parties may file suit in a designated forum, often the International Centre for the Settlement of Investment Disputes (ICSID), to resolve any claims arising from the treaty.⁸ While these treaties were enacted to encourage foreign investment in developing economies, they have recently been used by holdout investors to disrupt some of the restructuring settlements

¹ International Monetary Fund, *Sovereign Debt Restructuring—Recent Developments and Implications for the Fund's Legal and Policy Framework*, 6 (April 26, 2013), available at <https://www.imf.org/external/np/pp/eng/2013/042613.pdf>.

² *Greece's Default: The Wait is Over*, THE ECONOMIST, March 17, 2012, available at <http://www.economist.com/node/21550271>.

³ See, for example, *Exp.-Imp. Bank of the Republic of China v. Grenada*, 876 F. Supp. 2d 263 (S.D.N.Y. 2013).

⁴ See Ken Parks, *Argentina Sues U.S. in International Court of Justice Over Debt Dispute*, THE WALL STREET JOURNAL (Aug. 7, 2014) available at <http://online.wsj.com/articles/argentina-sues-u-s-in-international-court-of-justice-over-debt-dispute-1407431003>.

⁵ See Alexander E. M. Hess and Alexander Kent, *Not Just Argentina: 11 Countries Near Bankruptcy*, USA TODAY (Aug. 1, 2014) available at <http://www.usatoday.com/story/money/business/2014/07/31/countries-near-bankruptcy/13435097/>.

⁶ See, for example, *International Investment Agreements Navigator*, UNCTAD, <http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu>.

⁷ Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT'L L. 711, 716 (2007).

⁸ Kenneth J. Vandeveld, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621, 626 (1993).

proposed in sovereign debt defaults, thereby raising the risk of investment, rather than lowering it.

Part of these shifts in the sovereign debt restructuring landscape can be attributed to a shift in the types of creditors buying debt on the secondary markets, including the infamous hedge funds that gamble on distressed bonds—colloquially, “vulture funds.”⁹ Vulture funds have tenaciously opposed recent restructuring processes, choosing to hold out and pursue claims in national courts and international arbitration forums.¹⁰

Holdout investors first pursued claims in the ICSID when they rejected Argentina’s exchange offer after it defaulted in 2001.¹¹ It is likely that creditors will increasingly turn to this forum in future restructuring disputes, as it provides a viable alternative to national courts for creditors who hold sovereign debt and reside in a country that is party to a BIT with the debtor nation. In addition to the advent of new forums for resolving restructuring controversies, new contractual provisions in sovereign debt instruments have emerged, including collective action clauses (CACs), negative pledges, and *pari passu* clauses.

This Comment examines the effects of the growing ICSID involvement in sovereign debt restructuring, suggesting that this current trend is problematic because it may not streamline the restructuring process as some scholars have hypothesized. It may in fact increase uncertainty and costs of restructuring. Creditors are likely to forum shop under the current framework, alternating between national courts and international arbitration depending on which forum yields the highest expected payout.

Debtor countries may be able to reduce the time and uncertainty of sovereign debt restructuring by revising certain contractual provisions or developing novel restructuring strategies that are likely to minimize litigation or arbitration. International organizations, including the U.N. and the International Monetary Fund (IMF) have advocated a sovereign debt restructuring mechanism (SDRM), which has the potential to further streamline the sovereign debt restructuring process.

This Comment proceeds in the following six sections. Section II provides background information on sovereign debt restructuring. Sections III and IV examine the recent trend emerging in the last decade for creditors to pursue international arbitration through ICSID, or litigation in the U.S., rather than accept the terms of an exchange offer. Section V discusses potential solutions

⁹ See Lee C. Buchheit & Elizabeth Karpinski, *Grenada’s Innovations*, 4 J. INT’L BANKING & REG. 227, 229 (2006).

¹⁰ See *id.*

¹¹ See Ellie Norton, *International Investment Arbitration and the European Debt Crisis*, 13 CHI. J. INT’L L. 291, 292 (2012).

and Section VI describes Grenada's recent selective default and restructuring. Section VII discusses the consequences that an increased threat of holdout litigation and arbitration may have on the terms of Grenada's restructuring and that of future debtor countries. This Comment ultimately suggests that debtor countries should draft bonds with revised *pari passu* clauses, CACS, and negative pledges to maximize specificity in the drafting phase and minimize later disputes.

II. BACKGROUND

A. Sovereign Debt Restructuring

Access to credit is important for developed and developing nations alike, as sovereign debt often bridges the gap between tax revenue and government spending to provide its citizens with necessities and pursue fiscal growth strategies.¹² For developing countries especially, external debt can be used to finance defense and social programs, such as education and welfare.¹³ Through these investments, countries can build an educated and specialized workforce, improve social welfare, and ultimately raise their standard of living and economic outlook.¹⁴ Consequently, access to the international capital markets is crucial for developing nations looking to maximize their long-term economic growth.¹⁵ Just as with a private debtor, sovereign debtors are then obligated to repay the outstanding debt in accordance with a fixed maturity schedule.¹⁶

While private entities facing an unsustainable debt obligation can discharge debt through bankruptcy proceedings or an orderly restructuring process,¹⁷ the same is not true of sovereign debtors.¹⁸ Facing unsustainable obligations, countries typically default and engage in restructuring through a variety of techniques designed to change the debt's original payment terms.¹⁹ There is no

¹² John Muse-Fisher, *Starving the Vultures: NML Capital v. Republic of Argentina and Solutions to the Problem of Distressed-Debt Funds*, 102 CAL. L. REV. 1671, 1679 (2014).

¹³ *See id.* at 1679 n.40.

¹⁴ *See id.*

¹⁵ *See id.* at 1679 (citing R. Gaston Gelos, Ratna Sahay & Guido Sandleris, *Sovereign Borrowing by Developing Countries: What Determines Market Access?* 4 (IMF Working Paper No. WP/04/221, 2004), available at <http://www.imf.org/external/pubs/ft/wp/2004/wp04221.pdf>).

¹⁶ *See* Steven L. Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 CORNELL L. REV. 956, 958 (2000).

¹⁷ *See* Paul M. Goldschmid, *More Phoenix than Vulture: The Case for Distressed Investor Presence in the Bankruptcy Reorganization Process*, 2005 COL. BUS. L. REV. 191, 192–93 (2005).

¹⁸ *See* Muse-Fisher, *supra* note 12, at 1680.

¹⁹ *See id.*

standard international protocol for states to use when restructuring their sovereign debt.

Debtor countries may employ a variety of restructuring mechanisms.²⁰ The most common way to restructure sovereign debt is via a bond exchange—commonly known as an exchange offer—where investors are offered new bonds in exchange for the old instruments on a take-it-or-leave-it basis.²¹ The three main remedies at a sovereign's disposal when engaging in restructuring are: (1) “rescheduling,” a term for deferment of either interest payments or the principal on the old debt; (2) a “coupon reduction,” meaning a reduction in the rate of interest payable on the old debt; and (3) a “principal haircut”—that is, reducing the principal outstanding on the old debt.²² These remedies are often used in some combination with one another, and are by no means mutually exclusive.²³ In choosing which combination of these three options will be most effective, a country will often balance the magnitude of the needed debt relief against the affected creditors' preferences and propensity to hold out.²⁴

If creditors do not accept the terms of the exchange offer, they can hold out and sue for full repayment or simply hope for repayment under the original instruments.²⁵ Simply waiting to be paid is a risky strategy, as the old debt can be subordinated to the new, restructured debt.²⁶ For example, in its 2004 Offering Memorandum, Grenada stated that it “does not intend to pay any non-tendered Eligible Claims unless resources become available to do so.”²⁷

²⁰ It is important to note that SDRMs have been contemplated by a number of scholars. *See, for example*, Norton, *supra* note 11, at 308–09; Kenneth Rogoff & Jeromin Zettelmeyer, *Bankruptcy Procedures for Sovereigns: A History of Ideas, 1976–2001*, 49 IMF STAFF PAPERS 470 (2002), available at <http://www.imf.org/external/pubs/ft/staffp/2002/03/pdf/roffoff.pdf>; Steven L. Schwarcz, “Idiot’s Guide” to Sovereign Debt Restructuring, 53 EMORY L. J. 1189, 1195–97 (2004). The U.N. recently passed a resolution on sovereign debt restructuring, and the IMF has considered the idea as well. *See* U.N., *Resolution on Sovereign Debt Restructuring Adopted by General Assembly Establishes Multilateral Framework for Countries to Emerge from Financial Commitments*, GA/11542 (Sep. 9, 2014), available at <http://www.un.org/press/en/2014/ga11542.doc.htm> [hereinafter U.N. Resolution]; *see also* Anne O. Krueger, *A New Approach to Sovereign Debt Restructuring*, IMF (2002), available at <http://www.imf.org/external/pubs/ft/exrp/sdrm/eng/sdrm.pdf>.

²¹ These exchanges usually “include reductions in principal amounts, drops in interest rates, or extended payment periods, often leading to significant bondholder losses.” Norton, *supra* note 11, at 293.

²² *See* Buchheit & Karpinski, *supra* note 9, at 229.

²³ *See id.*

²⁴ *See id.*

²⁵ *Id.*

²⁶ *See, for example*, Grenada Offer to Exchange, Offering Memorandum 18 (Sep. 9, 2005), available at <http://www.iiij.org/courses/documents/GrenadaOfferingMemo.pdf>.

²⁷ *Id.*

However, pursuing “holdout litigation” is also a risky strategy, due to potential sovereign immunity defenses²⁸ and difficulty in actually recovering assets once there is a judgment in favor of the creditors.²⁹ This litigation can prolong the restructuring process and divert monetary resources from compliant creditors as well as the debtor nation. If the minority creditors prevail, they do so at the expense of the creditors who cooperated in the restructuring, undermining incentives to acquiesce to an exchange offer.³⁰ To avoid these protracted battles in foreign courts, governments who successfully restructure their debt have been known to pay holdout creditors under the table.³¹ Even if the plaintiffs successfully receive a judgment in their favor, legal remedies for creditors are often ineffective. Aside from sovereign immunity concerns, foreign creditors attempting to enforce a judgment in a domestic court against a debtor country often only have recourse to a limited pool of attachable assets.³²

B. Bilateral Investment Treaties

Demand for more developed international investment law has been largely driven by investors who recognized the potential for profitable activities overseas and encouraged their governments to negotiate for protection of these foreign investments.³³ That demand has resulted in the proliferation of BITs in the post-World War II era.³⁴ BITs are bilateral treaties intended to facilitate foreign private investment.³⁵ Most BITs include two distinct dispute resolution mechanisms in the event of a breach of the treaty terms: one for the contracting

²⁸ This Comment will not discuss the role of sovereign immunity as a defense brought by the debtor country. However, this issue has been discussed at length in scholarly literature. *See, for example, Foreign Sovereign Immunities Act of 1976—Postjudgment Discovery—Republic of Argentina v. NML Capital, Ltd.*, 128 HARV. L. REV. 381 (2014–15); Anna Gelpern, *Sovereign Damage Control*, PETERSON INST. FOR INT’L ECON. (May 2013).

²⁹ *See, for example, Gelpern, supra* note 28, at 2 (“[I]n the world of sovereign governments, immunity does just enough work to dissuade most creditors from rushing to the courthouse and persuade them to reduce their claims. . . . But unlike bankruptcy, immunity does not rehabilitate the debtor or guarantee fair treatment of all creditors.”).

³⁰ *See* Michael Waibel, *Opening Pandora’s Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT’L L. 711, 713 (2007); *see also Gelpern, supra* note 28, at 2 (characterizing the incentive to holdout as a “paradox—and a business model for a small minority of sophisticated creditors”—because sovereign debt can never be discharged and “never goes away”).

³¹ *See Gelpern, supra* note 28, at 3 (“Greece continues to pay the holders of its foreign-law bonds that refused to accept its 2012 restructuring offer.”).

³² *See Waibel, supra* note 30, at 713.

³³ Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and their Grand Bargain*, 46 HARV. INT’L L.J. 67, 71 (2005).

³⁴ *See id.* at 71–72.

³⁵ *See id.* at 72–73.

states themselves and another for resolving disputes between a country and foreign private investors.³⁶ For foreign investors, BITs generally designate a specific international arbitration forum—often the ICSID—as the means for settling disputes.³⁷ While investors may need to exhaust local remedies first, BITs generally grant the investor the power to invoke international arbitration and secure a binding award independent of any other diplomatic relations between the investors' home country and the country causing the alleged injury.³⁸ The right of “aggrieved investors . . . to prosecute their claims autonomously, without regard to concerns or interests of their source countries” is seen as a mechanism that “enables these bilateral treaties to afford protection of foreign investment.”³⁹

BITs have gained in popularity in the post-World War II era, largely because they are thought to provide a clear and enforceable framework of rules that reduces risk for investors and encourages private investment in developing countries.⁴⁰ Essentially, “a BIT between a developed and developing country is founded on a grand bargain: a *promise* of protection of capital in return for the *prospect* of more capital in the future.”⁴¹ BITs generally contain the following provisions to protect foreign investment: (1) protection against expropriation, (2) guarantees of “national treatment,” (3) a promise of “fair and equitable treatment,” and (4) transfer protection.⁴²

Expropriation is normally defined as “any state action that deprives investors of the ownership, control, and/or economic benefit of their investments.”⁴³ Most BITs prohibit expropriation, unless the property of a foreigner is taken “(1) for a public purpose, (2) in a non-discriminatory manner, (3) upon payment of just compensation, and in most instances, (4) with provision for some form of judicial review.”⁴⁴ In sovereign debt restructuring, creditors may only have the choice between an outright default and accepting an exchange offer.⁴⁵ Under the requisite circumstances, both options may be considered a “substantial deprivation” of the economic benefit of the bond, a

³⁶ See *id.* at 87.

³⁷ See *id.* at 88.

³⁸ See *id.*

³⁹ *Id.*

⁴⁰ See *id.* at 73–77.

⁴¹ *Id.* at 77 (emphasis in original).

⁴² Norton, *supra* note 11, at 295–97.

⁴³ *Id.* at 295.

⁴⁴ Salacuse & Sullivan, *supra* note 33, at 87.

⁴⁵ See Buchheit & Karpinski, *supra* note 9, at 229–30.

violation of the expropriation clause of the relevant BIT.⁴⁶ A “national treatment” clause requires “that foreign investors from one state be treated the same as national investors and foreign investors from other states,”⁴⁷ while “fair and equitable treatment” clauses have “generally been interpreted to grant investors rights to transparency, freedom from harassment and coercion, due process, good faith, and protection of reasonable expectations.”⁴⁸ Finally, “transfer protection” clauses ensure that capital flows are not interrupted unnecessarily through restrictive tax regimes or the like.⁴⁹ A typical transfer protection clause provides for “the unrestricted transfer of the investment and its return, to be effectuated without delay.”⁵⁰

BITs can vary in the scope of their subject matter jurisdiction; some have broad jurisdiction, covering “any dispute relating to investments” while other BITs restrict subject matter jurisdiction to only cover discreet obligations created within the treaty itself.⁵¹ Thus, in addition to the four main categories of provisions that protect investors’ interests, the more expansive BITs often contain “umbrella” clauses.⁵² Under an umbrella clause, the host country assumes the additional responsibility for any other contractual obligations it has undertaken beyond the explicit scope of the BIT.⁵³ Umbrella clauses generally cover additional investment agreements that the state enters into with foreigners.⁵⁴ Depending on the precise language of the umbrella clause, a foreign investor could allege that the umbrella clause embedded in the governing BIT entitles the investor to the BIT’s dispute resolution mechanisms when a dispute arises over the contractual provisions in a sovereign debt instrument.

⁴⁶ Norton, *supra* note 11, at 295 (citing ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 344 (2009)).

⁴⁷ *Id.*

⁴⁸ *Id.* at 296.

⁴⁹ *Id.* at 297 (internal quotation marks omitted).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See OECD, *Interpretation of the Umbrella Clause in Investment Agreements*, in INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS (2008), available at <http://www.oecd.org/investment/internationalinvestmentagreements/40471535.pdf>.

⁵³ UNCTAD, *Sovereign Debt Restructuring and International Investment Agreements*, IIA Issues No. 2, 5 (July 2011), available at http://unctad.org/en/Docs/webdiaepcb2011d3_en.pdf. See also OECD, *supra* note 52, at 101.

⁵⁴ OECD, *supra* note 52, at 102.

C. Contractual Provisions

In addition to greater access to tribunals and courts to contest the terms of an exchange offer, there are many contractual provisions that may be inserted into the bond agreements themselves to provide creditors with greater security. These provisions often emerge as points of dispute in holdout litigation or investor-state arbitration proceedings when creditors allege that the restructuring mechanism breaches one or more of these contractual safeguards. These mechanisms include: CACs, *pari passu* clauses, and negative pledges.

CACs are perhaps the most relevant contractual provision in preventing holdout problems before they rise to the level of holdout litigation or international arbitration. Generally, CACs set out the “conditions under which the payment terms for a bond can be modified.”⁵⁵ While drafters can construct CACs in several ways to suit the goals for a particular issuance, CACs typically contain the following features: (1) a “collective representation component,” under which a bondholders’ meeting can be convened to discuss default or restructuring terms;⁵⁶ (2) a “majority restructuring component” that enables a supermajority, usually 75 percent, of bondholders to bind all holders within the same bond issue to the terms of restructuring; and (3) a “minimum enforcement component” whereby a minimum of bondholders, usually 25 percent, must agree that litigation can be undertaken.⁵⁷ More than 90 percent of newly issued sovereign bonds contain CACs.⁵⁸ Scholars have noted that, “as a general matter, it would appear that where the majority imposes the terms of restructuring on all bondholders within the bond issue, dissenting bondholders cannot succeed” on their separately pursued bond claims.⁵⁹

While CACs can effectively bind dissenting bondholders to the terms of a restructuring plan, there are some drawbacks to their use. CACs vary by contract and can lack uniformity across different bond issuances for a sovereign debtor.⁶⁰ Thus, if a particular issuance has a CAC clause, specific examination of the language is necessary to determine whether or not it can effectively prevent a

⁵⁵ Stephen L. Choi, Mitu Gulati & Eric A. Posner, *Pricing Terms in Sovereign Debt Contracts: A Greek Case Study with Implications for the European Crisis Resolution Mechanism*, John M. Olin Law & Economics Working Paper No. 541 (2011), at 10, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1713914.

⁵⁶ UNCTAD, *supra* note 53, at 6.

⁵⁷ *Id.* at 6.

⁵⁸ Eric Helleiner, *Filling a Hole in Global Financial Governance? The Politics of Regulating Sovereign Debt Restructuring*, in *THE POLITICS OF GLOBAL REGULATION* 105 (Walter Mattli & Ngaire Woods eds., 2009).

⁵⁹ UNCTAD, *supra* note 53, at 6.

⁶⁰ *See id.* at 7.

claim raised in international arbitration or litigation. Additionally, CACs do not adequately address the “aggregation problem” that can arise when a debtor has multiple bond issues headed towards default or subject to a cross-default clause.⁶¹ This is because CACs are limited to the individual bond issues that they are written for, and do not affect additional bond issuances.⁶² In the event of default of certain issuances, the debtor country will almost certainly have multiple bond issuances outstanding at the same time, which can be freely traded on secondary markets. Holdout creditors can strategically buy controlling positions in a single distressed issuance in order to overcome the CAC restrictions upon default.⁶³

In the context of private debt restructuring, a *pari passu* clause ensures that debts ranked *pari passu* will have the same priority in an insolvency distribution.⁶⁴ While the notion of *pari passu* in the sovereign debt restructuring context is complicated by the fact that countries cannot declare bankruptcy and go through the reorganization process, holdout creditors have alleged breaches of *pari passu* clauses in the sovereign debt context. For example, *Elliot Associates v. Peru*⁶⁵ stands for the proposition that “the *pari passu* clause restricts debtors, particularly those in default, to making pro rata payments to all creditors protected by the *pari passu* clause.”⁶⁶ It is important to note, however, that “Official Sector” lenders (such as the IMF and the World Bank) typically “enjoy de facto priority over other lenders.”⁶⁷ Even with a *pari passu* clause in place, these Official Sector lenders may be able to negotiate different terms than their private counterparts.⁶⁸

A negative pledge clause, known particularly for its use in secured transactions, can be used in sovereign debt contracts as well.⁶⁹ In practice, a negative pledge “typically restricts the sovereign from granting security interests to future borrowers, unless prior borrowers are secured on an equal basis.”⁷⁰ In the sovereign debt context, these contractual provisions tend to reserve priority

⁶¹ See *id.*

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See Choi et al., *supra* note 55, at 15.

⁶⁵ *Elliot Assocs., L.P.*, General Docket No. 2000/QR/92 (Court of Appeal of Brussels, 8th Chamber, Sept. 26, 2000) (granting the hedge fund, Elliot Associates, an injunction against Peru that would prohibit it from paying certain creditors unless it made pro rata payments to all creditors ranked *pari passu*).

⁶⁶ Choi et al., *supra* note 55, at 15 (discussing the *Elliot Associates* case).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See *id.* at 14.

⁷⁰ *Id.*

for debt holders, ensure equity across issuances, and prevent holdouts from standing in the way of an orderly and efficient restructuring process.

III. INTERNATIONAL INVESTMENT ARBITRATION IN ICSID

Over the past decade there has been an increase in the number of investor-state arbitrations, raising complex procedural and substantive issues.⁷¹ The first ever attempt by private investors holding sovereign debt occurred when creditors first challenged the terms of Argentina's bond exchange as a violation of BITs between Italy and Argentina when it defaulted in 2001.⁷² Before the following series of investment disputes: *Abaclat v. Argentine Republic*,⁷³ *Ambiente Ufficio v. Argentine Republic*,⁷⁴ and *Alemanni v. Argentine Republic*,⁷⁵ the ICSID tribunal had not been asked to determine whether sovereign debt constituted an "investment" under the terms of a BIT.⁷⁶ This trilogy of decisions ultimately resulted in greater ICSID involvement in sovereign debt disputes, and illustrates the current landscape for sovereign debt disputes in this forum.⁷⁷

In the early 1990s, Argentina enacted a plan to improve economic growth while reducing debt and inflation. To encourage foreign investment, Argentina entered into BITs and enacted laws to encourage capital investment through sovereign bond issuances.⁷⁸ Within a decade, however, Argentina found itself heading into a severe recession and defaulted on its debt.⁷⁹ In 2005, Argentina opened an exchange offer on over \$100 billion USD in principal and interest for its defaulted bonds.⁸⁰ At the same time, Argentina enacted a law (known as an

⁷¹ See Susan L. Karamanian, *Introductory Note to Abaclat and others v. Argentine Republic: Decision on Jurisdiction and Admissibility* (ICSID), 52 I.L.M. 667, 667 (2013).

⁷² See Norton, *supra* note 11, at 292.

⁷³ *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011). To note, on August 4, 2011, the *Abaclat* Tribunal issued its Majority Decision, while the Minority Decision was issued on October 28, 2011.

⁷⁴ *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (Feb. 8, 2013).

⁷⁵ *Alemanni and others v. Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (Nov. 17, 2014).

⁷⁶ See Norton, *supra* note 11, at 297.

⁷⁷ See S. I. Strong, *Ambiente Ufficio S.p.A and others v. Argentine Republic: Heir of Abaclat? Mass and Multiparty Proceedings*, ICSID REVIEW (2014), available at <http://icsidreview.oxfordjournals.org/content/early/2014/01/16/icsidreview.sit044.full>.

⁷⁸ See Jessica Beess und Chrostin, *Sovereign Debt Restructuring and Mass Claims Arbitration before the ICSID*, The *Abaclat* Case, 53 HARV. INT'L L.J. 505, 505–06 (2012).

⁷⁹ See *id.* at 506.

⁸⁰ *Id.* According to the U.N. Committee on Trade and Development, Argentina restructured approximately \$62 billion USD in debt. See UNCTAD, *supra* note 53, at 3.

“Emergency Law” or a “Cram Down Law”), which precluded the government from reopening the exchange offer process or entering into settlement agreements with creditors who could have participated in the exchange but chose not to.⁸¹ While this law was suspended temporarily in 2010 to allow for another exchange offer, some claimants still refused to participate and pursued arbitration in the ICSID.⁸²

A. The Holdings in *Abaclat*, *Ambiente Ufficio*, and *Alemanni*

Three groups of investors from Italy challenged Argentina's conduct in the ICSID. The parties agreed to multiple phases of the proceedings, with the preliminary phase concerning only jurisdiction and admissibility.⁸³ To date, there has not been a decision on the merits. On August 4, 2011, the ICSID issued its first opinion on jurisdiction and admissibility in the matter of *Abaclat*.⁸⁴ The tribunal addressed three issues pertaining to jurisdiction and admissibility: (1) whether sovereign debt qualifies under the definition of “investment” provided in the Italy-Argentina BIT; (2) whether individual claims can be aggregated into a single “mass claim;” and (3) whether a country's unilateral action to restructure debt in violation of a BIT provision gives rise to a treaty claim or merely a contractual dispute.⁸⁵

In determining whether or not sovereign bonds qualified as investments for the purposes of the Italy-Argentina BIT, the majority in *Abaclat* looked to the text of the BIT as well as the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention).⁸⁶ To resolve whether sovereign debt fell within the general “investment” definition in the BITs, the tribunal in *Abaclat* developed a “double-barreled test” under which the investment must satisfy the definitions set forth in both the relevant BIT in this case the Italy-Argentina BIT and the ICSID Convention to be classified as an investment under the BIT.⁸⁷ Applying the test, the *Abaclat* tribunal interpreted the definition of investment under the BIT to include “obligations, private or public title or any other right to performances or services having economic value, including capitalized revenues.”⁸⁸ It also held that Article

⁸¹ See Norton, *supra* note 11, at 297.

⁸² *Id.* at 297–98. Holdout creditors also pursued litigation in the U.S. and other countries as well.

⁸³ *Alemanni*, ICSID Case No. ARB/07/8, ¶ 252.

⁸⁴ *Abaclat*, ICSID Case No. ARB/07/5.

⁸⁵ Norton, *supra* note 11, at 298.

⁸⁶ See *Abaclat*, ICSID Case No. ARB/07/5, ¶ 344.

⁸⁷ See *id.*

⁸⁸ *Id.* ¶ 352.

1(1)(c) of the BIT included financial instruments.⁸⁹ The *Alemanni* tribunal agreed that sovereign debt constitutes an investment for the purposes of the BIT because sovereign bonds had been used as an example of the kinds of investments included within the ICSID Convention.⁹⁰ The *Alemanni* tribunal also rejected the argument that the bonds at issue were not investments in Argentina because they were purchased by the current bondholders on the secondary markets, not from Argentina itself.⁹¹

After concluding that the claimants' bonds qualified as investments under the ICSID Convention and the Italy-Argentina BIT, the tribunal in *Abaclat* turned to the question of whether these claims could be aggregated together as a mass claim. Because Article 44 of the ICSID Convention gives the tribunal the authority to resolve questions of procedure when the Convention itself is silent on them, and Article 19 of the ICSID Arbitration Rules permits the tribunal to dictate the procedure to be followed in a given proceeding, the tribunal in *Abaclat* held that mass claims are permissible in an arbitration governed by the ICSID Arbitration Rules.⁹²

The *Alemanni* tribunal took a more nuanced approach in determining whether the claims submitted to the ICSID tribunal constituted treaty claims or were purely contractual claims.⁹³ The tribunal determined that there were "separate contractual claims and claims arising under the Argentina-Italy BIT."⁹⁴ Argentina's exchange offer was derived from its sovereign power, and because the asserted claims contained elements beyond pure contractual claims, the tribunal held that they were covered by the terms of the Argentina-Italy BIT.⁹⁵

Additionally, in *Alemanni* the tribunal explained what weight it gave precedent, referencing statements made by the *Ambiente Ufficio* tribunal. While "it is highly common for arbitral tribunals in general and ICSID tribunals in particular to take inspiration from the decisions of other tribunals having faced similar questions or situations," the tribunal is not bound by *stare decisis* as U.S. courts are.⁹⁶ However, the dissent in *Ambiente Ufficio* cautioned against relying on

⁸⁹ See *id.* ¶ 353.

⁹⁰ *Alemanni*, ICSID Case No. ARB/07/8, ¶ 296.

⁹¹ Specifically, the tribunal in *Alemanni* held that for the sovereign bonds, "the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred." *Abaclat*, ICSID Case No. ARB/07/5, ¶ 374.

⁹² See *Abaclat*, ICSID Case No. ARB/07/5, ¶¶ 515–34.

⁹³ See Beess und Chrostin, *supra* note 78, at 509.

⁹⁴ *Id.*

⁹⁵ See *id.* at 509–10.

⁹⁶ *Alemanni*, ICSID Case No. ARB/07/8, ¶ 255 (quoting *Ambiente Ufficio*, ICSID Case No. ARB/08/9, at ¶¶ 12–13) ("Far from adhering to any doctrine of *stare decisis* or considering itself

Abaclat merely because “greater consistency in investment treaty arbitration would be desirable.”⁹⁷ Thus, while the reasoning and holdings of the tribunal are important, they would only be of a persuasive nature for future proceedings.⁹⁸

In each of the matters, Argentina challenged the investors’ claims by alleging that jurisdictional preconditions specified in the Italy-Argentina BIT had not been met.⁹⁹ Article 8(1) of the BIT provides that disputes shall be resolved through “amicable consultations” to the extent they are possible, and under Article 8(2), only if they remain unresolved can they be submitted to a “competent administrative or judicial process of the host State.”¹⁰⁰ The BIT provides that parties may submit the dispute to the ICSID only “[i]f a dispute still exists between investors and a Contracting Party, after a period of 18 months has elapsed since notification of the commencement of the proceeding before the national jurisdictions indicated in paragraph (2), the dispute may be submitted to international arbitration.”¹⁰¹ At this point, the Contracting Party is thought to have given “its advance and irrevocable consent” to arbitration.¹⁰² The claimants conceded that they had not attempted to resolve the dispute through an amicable consultation or proceedings in the national jurisdictions, arguing that would have been fruitless.¹⁰³

All three of the tribunals decided the issue in favor of the creditors, but employed different theories. In *Abaclat*, the tribunal recast the question, asking, “was Argentina deprived of a fair opportunity to address the dispute within the framework of its own domestic legal system because of the Claimants disregard of the 18 months litigation requirement?” and examined the relative positions of the parties.¹⁰⁴ The *Alemanni* tribunal, however, found the more nuanced approach taken by the *Ambiente Ufficio* tribunal to be more persuasive.¹⁰⁵ The *Ambiente Ufficio* tribunal focused on Article 8 of the Italy-Argentina BIT rather than frame the inquiry as one of greater consideration of fairness and

legally bound by the findings of the *Abaclat* tribunal, this implies a process of critically engaging with the majority decision, but also with the counter-arguments.”).

⁹⁷ *Ambiente Ufficio*, Dissent, ICSID Case No. ARB 08/9, ¶¶ 46, 52-53.

⁹⁸ See Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN. ST. L. REV. 1269, 1273 (2009).

⁹⁹ See *Alemanni*, ICSID Case No. ARB/07/8, ¶ 274.

¹⁰⁰ *Id.* ¶ 301.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* ¶ 302.

¹⁰⁴ *Id.* ¶ 303.

¹⁰⁵ See *id.* ¶ 304.

efficiency.¹⁰⁶ The *Alemanni* tribunal interpreted the “insofar as possible” phrase in Article 8(1) as “relating more directly to the prospect of arriving at a friendly settlement of the dispute than the possibility of bringing consultations into being.”¹⁰⁷ This interpretation departs most significantly from the *Ambiente Ufficio* tribunal.¹⁰⁸

The claimants in *Alemanni* attempted to excuse their decision to simply pursue an action in the ICSID rather than working through consultations and local courts. They argued that it was futile to attempt to settle the dispute through consultation, and unrealistic to secure a meaningful remedy from the Argentinian courts based on current policies and court decisions.¹⁰⁹ The tribunal held that in light of the existing laws, including the Cram Down Law, and Argentinian Supreme Court precedent, “the Argentine judicial system is not . . . ‘reasonably capable of providing effective relief,’ with the consequence that a ‘successful outcome is [not] likely or possible.’”¹¹⁰

B. Further Implications

Scholars have discussed the implications of the *Abaclat* decision. One commentator suggests that greater ICSID involvement in the world of sovereign debt restructuring will prove beneficial for several reasons, such as “improv[ing] creditor protections, stabiliz[ing] the market for sovereign debt, and allow[ing] for more balanced bargaining during restructuring.”¹¹¹

It is not entirely clear whether greater ICSID involvement in sovereign debt restructuring disputes would “allow the growth of a healthy market for sovereign debt—one not based solely on reputation but on reliable contracts,” at least in the near term.¹¹² Ideally, greater guidance from ICSID tribunals on how various contractual provisions ought to be interpreted would encourage parties to incorporate such language or otherwise rewrite the terms of the bonds.

However, given ICSID’s view on the weight of precedent, it is possible that greater ICSID interpretation of these contractual terms will result in greater ambiguity as to how these provisions will be interpreted in the next dispute. Greater ICSID involvement in sovereign debt restructuring disputes does not necessarily imply a greater predictability for how claims will be resolved in that

¹⁰⁶ *Id.* ¶ 304–05.

¹⁰⁷ *Id.* ¶ 310.

¹⁰⁸ *Id.*

¹⁰⁹ *See id.* ¶¶ 313–14.

¹¹⁰ *Id.* ¶ 316 (addition in original).

¹¹¹ *See Norton, supra* note 11, at 300.

¹¹² *Id.* at 302.

tribunal. As noted in the ICSID decisions, each opinion holds no precedential value.¹¹³ While the three decisions had considerable internal consistency, it may be due to the fact that they were all interpreting the same treaty provisions and considering the same conduct. It remains to be seen whether a BIT containing different language in its definition of “investment” may sway a different tribunal to hold that sovereign debt disputes are outside of ICSID jurisdiction. However, one concern that emerges is the unpredictability of using ICSID, as it does not follow a conception of *stare decisis* that investors using U.S. and other common law-based courts are accustomed to. As investors test novel arguments and attempt to stretch reasoning from prior decisions to extend the current trend, international arbitration in ICSID will become increasingly unpredictable, lowering the overall expected value of pursuing a claim through arbitration rather than the U.S. court system.

Other scholars have criticized the use of the ICSID forum because it lacks the institutional competence to determine the debtor country's ability to pay following default.¹¹⁴ While this is a valid concern, it applies equally to the ICSID as well as any national court presiding over a sovereign debt restructuring dispute. Additionally, given the novelty of pursuing claims that arise out of sovereign debt restructuring disputes, ICSID does not necessarily have the expertise to address sovereign debt restructuring issues in an efficient manner. Greater ICSID jurisdiction over these types of disputes may seem beneficial because it would allow for greater specialization going forward. This argument is tenuous because ICSID will not be able to build from a body of precedent in the same way that common law courts can. Further, given the limited role that precedent plays in international arbitration in the ICSID tribunals, there is little certainty about what a tribunal will hold at this point. With the uncertainty that still remains, it is important to consider how investor claims may fare in the court system, arguably the closest substitute for resolution in international arbitration.

IV. HOLDOUT LITIGATION IN U.S. FEDERAL COURTS

One of the threats to a sovereign debt restructuring program is that a subset of creditors will refuse to agree to the bond exchanges or other proposed terms and pursue full repayment under the original bond terms through litigation. Holdout creditors sued Argentina and Grenada after refusing to accept the issuer's exchange offer for the distressed debt they held, pursuing claims in

¹¹³ See, for example, *Aleman*, ICSID Case No. ARB/07/8, ¶ 255 (quoting *Ambiente Ufficio*, ICSID Case No. ARB 08/9, at ¶¶ 12–13).

¹¹⁴ See, for example, MICHAEL WAIBEL, *SOVEREIGN DEFAULTS BEFORE INTERNATIONAL COURTS AND TRIBUNALS* (2011).

the U.S. and other countries. In both *NML Capital v. Argentina*,¹¹⁵ and *Exp.-Imp. Bank of the Republic of China v. Grenada*,¹¹⁶ creditors have been able to challenge the restructuring process in U.S. courts without being precluded by any sovereign immunity defenses. Thus, in evaluating the likelihood that holdout creditors might pursue international arbitration in the ICSID to maximize their return on the defaulted sovereign debt, it is important to examine whether the use of alternative tribunals might present a means of maximizing holdout claims.

A. *NML Capital Ltd. v. Argentina*

In *NML Capital Ltd. v. Argentina*, a consortium of distressed debt funds led by NML Capital (collectively referred to as NML) sued the Argentinian government, demanding specific performance of the underlying bond covenants on the debt they held.¹¹⁷ The central issue was whether Argentina breached the bonds' *pari passu* clauses.¹¹⁸ NML argued that Argentina's subordination of NML's bonds to other creditors' debt obligations that were exchanged in its exchange offer violated the *pari passu* clause.¹¹⁹

The U.S. Court of Appeals for the Second Circuit upheld an injunction that would prevent Argentina from paying the holders of the restructured bonds until it paid NML on a *pro-rata* basis, and remanded the case for the trial court to determine the full amount Argentina would have to pay the NML, among other issues.¹²⁰

Following the Second Circuit opinion, the District Court issued an amended injunction.¹²¹ Under the revised injunction, Argentina could not pay holders of its restructured bonds according to the terms of its exchange offer unless it paid NML approximately \$1.4 billion—its full obligation.¹²² To bolster the force of the injunction, the court threatened contempt sanctions for third parties handling Argentina's funds if it tried to pay the holders of the restructured bonds anyway, potentially reaching trustees, securities clearing

¹¹⁵ 699 F.3d.

¹¹⁶ 13 Civ. 1450 (HB), 2013 U.S. Dist. LEXIS 117740 (S.D.N.Y. Aug. 19, 2013).

¹¹⁷ *NML Capital, Ltd. v. Republic of Argentina*, Nos. 08-cv-6978 (TPG), 09-cv-1707 (TPG), 09-cv-1708 (TPG), 2011 (S.D.N.Y. Dec. 7, 2011).

¹¹⁸ *Id.* at 252.

¹¹⁹ *See id.* at 251–52.

¹²⁰ *NML Capital*, 699 F.3d at 250.

¹²¹ *See Order, NML Capital Ltd v. Republic of Argentina*, Nos. 08-cv-6978 (TPG), 09-cv-1707 (TPG), 09-cv-1708 (TPG) (S.D.N.Y. Nov. 21, 2012).

¹²² W. Mark C. Weidemaier & Anna Gelpern, *Injunctions in Sovereign Debt Litigation*, 31 YALE J. REG. 189, 191 (2014).

houses, and payment intermediaries.¹²³ It would be possible for Argentina to comply with this injunction, however, by simply refusing to pay any creditors. Critics argue that this type of injunction “turns traditional injunction practice . . . on its head” because it seeks to maximize potential costs on independent third parties, rather than minimize irreparable harm to the plaintiff.¹²⁴

NML Capital has the potential to fundamentally undermine the incentive for creditors to participate in any sort of bond exchange or voluntary contractual renegotiation when they could hold out and still be paid on a *pro rata* basis in the worst case scenario. Or worse, they could expend resources participating in the exchange offer process and still have the flow of their restructured payments disrupted by a holdout creditor seeking this form of an injunction.

B. *Exp.-Imp. Bank of the Republic of China v. Grenada*

Following the United States Court of Appeals for the Second Circuit opinion in *NML Capital*, the United States District Court for the Southern District of New York issued an opinion in *Exp.-Imp. Bank of the Republic of China v. Grenada*.¹²⁵ The dispute arose after Grenada defaulted on four loan agreements with the Ex-Im Bank of the Republic of China.¹²⁶ In 2006, Grenada reestablished diplomatic ties with Beijing rather than Taiwan.¹²⁷ Consequently, Grenada did not restructure its obligations under the loan agreements with the Ex-Im Bank through the Paris Club¹²⁸ or by any other means, and the Ex-Im Bank sued for payment.¹²⁹ The Ex-Im Bank received a \$21.6 million judgment with prejudgment interest but was not subsequently paid.¹³⁰

¹²³ See *id.* at 191–92, 196.

¹²⁴ *Id.* at 193.

¹²⁵ *Exp.-Imp. Bank of the Republic of China*, 2013 U.S. Dist. LEXIS 117740.

¹²⁶ *Id.* at *2.

¹²⁷ Anna Gelpern, *From Argentina to Grenada: Will Creditor Options Grow in Future Sovereign Debt Litigation?* PETERSON INST. FOR INT'L ECON. (Aug. 22, 2013), available at <http://blogs.piie.com/realtime/?p=3934>.

¹²⁸ See Cheng-Yun Tsang, *Ex-Im Bank v Grenada: Adding Clarity or Confusion?* CAP. MKTS. L. J. 30 (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2480531, at 6 n.13 (“The Paris Club is a voluntary, informal group of creditor nations, which provides debt relief to indebted countries. The Paris Club is the major forum where creditor countries renegotiate official sector debts. . . . The Paris Club includes the United States and 18 other permanent members . . . Other creditors are allowed to participate in negotiations on an ad-hoc basis.”). See also MARTIN A. WEISS, CONG. RESEARCH SERV., RS21482, THE PARIS CLUB AND INTERNATIONAL DEBT RELIEF 1 (2012).

¹²⁹ Gelpern, *supra* note 127.

¹³⁰ *Exp.-Imp. Bank of the Republic of China*, 06 Civ. 2469 (HB), 2010 U.S. Dist. LEXIS 137310, *2 (S.D.N.Y. Dec. 29, 2010).

Following the success of the holdout creditors in *NML Capital*, the Ex-Im Bank filed another lawsuit in the U.S., demanding to be repaid in full before Grenada paid any other creditors on its restructured debts.¹³¹ The issue presented in this lawsuit was whether Grenada violated the *pari passu* clause and a negative covenant in its loan agreements.¹³² Specifically, Ex-Im Bank alleged that Grenada failed to pay the judgment it owed while making interest payments to other creditors on restructured debt.¹³³ In response to these allegations, Grenada argued that the case should be dismissed under the merger doctrine or the doctrine of *res judicata* because the court considered breach of contract claims in the previous lawsuit.¹³⁴ Considering *pari passu* and negative pledge claims would amount to re-litigating allegations that could have been raised in the prior matter.¹³⁵ Both parties moved for a motion for judgment on the pleadings.¹³⁶

The court denied both Rule 12(c) motions for judgment on the pleadings,¹³⁷ defeating Grenada's motion because the first action brought no claim under the *pari passu* clause specifically.¹³⁸ The court also defeated Ex-Im Bank's motion because the pleadings were insufficient to support Grenada's liability regarding a breach of the *pari passu* clause and a negative pledge provision.¹³⁹

C. Implications from Increased Litigation in U.S. Courts

NML Capital and *Ex-Im Bank* demonstrate that judgment creditors may find it profitable to assert claims regarding *pari passu* and negative pledges in a later lawsuit, because doing so provides them two bites at the apple. Greater potential for a payoff from bringing holdout claims in multiple stages may undermine the centrality of the ICSID as a forum for the resolution of sovereign debt restructuring disputes. With the rich body of precedent available in the U.S. courts, creditors may choose to pursue litigation on novel interpretations of bond terms or new theories on breach of contract, especially when the courts have been willing to draw upon the interpretation of these sorts of terms from the private debtor setting.

¹³¹ *Exp.-Imp. Bank of China*, 2013 U.S. Dist. LEXIS 117740 at *2–3.

¹³² *Id.* at *3.

¹³³ *Id.* at *4.

¹³⁴ *Id.*, at *5.

¹³⁵ *Id.* at *5.

¹³⁶ *Id.* at *1.

¹³⁷ *Id.* at *2.

¹³⁸ *Id.* at *7.

¹³⁹ *Id.* at *11.

Ex-Im Bank illustrates a significant underlying change in sovereign debt litigation practices to “litotiation,” or a blurring of the line between litigation and negotiation between sovereigns and holdouts.¹⁴⁰ Giving judgment creditors the chance to pursue their claims in stages provides different incentives and leverage opportunities.¹⁴¹ Joseph Cotterill argues that this may not prove problematic on policy grounds, because “[i]f all potential holdouts sued over *pari passu* at the same time as seeking judgment on default, creditors who agree to a restructuring could get snared much earlier, perhaps including before any payments are made,” which would in turn prevent creditors from exchanging their bonds initially.¹⁴² Holdout problems are likely to be exacerbated if judgment creditors may interrupt the payments of the creditors who have participated in the restructuring process.¹⁴³ However, a systemic reexamination and re-draft of *pari passu* provisions, negative covenants, and negative pledges may mitigate the issue.¹⁴⁴

Laura Alfaro takes a different approach, arguing that *Ex-Im Bank* restricts the scope of *NML Capital* because the court did not automatically apply the *NML* precedent.¹⁴⁵ Alfaro concludes that *NML Capital*'s holding was largely fact-specific and unlikely to be used automatically for future sovereign debt restructuring controversies.¹⁴⁶ Alfaro correctly notes that the court found Argentina “uniquely recalcitrant,” which suggests that its conduct was exceptionally egregious, however, the opinion does not define the boundaries of such extraordinary conduct.¹⁴⁷ Further, it is unclear that condemnation of the country's action affects the court's analysis of contractual provisions. In her view, “the incentives for holdout litigation are limited because of (1) significant constraints on creditor litigation, (2) substantial economic and reputational costs associated with such litigation, and (3) the availability of contractual provisions and negotiating strategies that mitigate the debtor's collection action problems.”¹⁴⁸

¹⁴⁰ Joseph Cotterill, *Sovereign Pari Passu and the Litigators of the Lost Cause* FINANCIAL TIMES 1, 8 (Nov. 29, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2361134.

¹⁴¹ See *id.* at 9–10.

¹⁴² *Id.* at 10.

¹⁴³ Tsang, *supra* note 128, at 28.

¹⁴⁴ *Id.* at 30.

¹⁴⁵ Laura Alfaro, *Sovereign Debt Restructuring: Evaluating the Impact of the Argentina Ruling*, Harv. Bus. L. Rev., at 32 (June 16, 2014)(unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2451144.

¹⁴⁶ *Id.* at 3.

¹⁴⁷ *Id.* at 31; *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 247 (2d Cir. 2013).

¹⁴⁸ Alfaro, *supra* note 145, at 1.

Holdout litigation in the U.S. may pose a realistic threat to an orderly restructuring process for Grenada given that U.S. courts appear to provide the possibility of meaningful injunctive relief to other similarly situated investors. Such litigation would impose significant burdens on the sovereign debt restructuring process by adding the time and expense of trial. These burdens would siphon resources from the creditors who complied with the exchange offer to those who did not, thereby raising the cost of compliance and the risk of nonpayment, even under the restructured terms. While the recent cases raised novel questions of contractual interpretation, the scope of sovereign immunity, and potential remedies, this area of the law is far from developed. Paradoxically, this uncertainty may be a beneficial deterrent for all but the most determined holdout creditors, relative to other options.

V. ADDITIONAL SOLUTIONS

A. Better Contractual Provisions

To minimize the chance of holdout litigation, countries should amend certain contractual provisions within the bonds themselves. In the wake of the Argentina saga, the IMF recommended that certain changes be made to CACs and *pari passu* clauses in sovereign debt contracts.¹⁴⁹ Specifically, the IMF advocated for a modification in *pari passu* clauses so that they explicitly exclude an obligation to “pay creditors on a ratable basis” in an effort to avoid the result in *NML Capital*.¹⁵⁰ Both of these modifications would provide greater certainty for debtors and creditors, and ultimately minimize future costs.

The IMF also proposed a new structure for CACs in an effort to minimize the chance that vulture funds could purchase a sufficient proportion of a debt issuance on the secondary market and hold up restructuring of issuances containing CACs. It proposed a CAC with a more “robust ‘aggregation’” provision.¹⁵¹ Instead of allowing bondholders to vote on a series-by-series basis, these new CACs would invoke a “single limb voting procedure” where bonds can be restructured as long as a supermajority votes across all of the issuances

¹⁴⁹ Cara Salvatore, *Argentina-Like Debt Contracts Need Revamp, IMF Says*, LAW360 (Oct. 6, 2014), available at <http://www.law360.com/articles/584660/print?section=assetmanagement>.

¹⁵⁰ International Monetary Fund, STRENGTHENING THE CONTRACTUAL FRAMEWORK TO ADDRESS COLLECTIVE ACTION PROBLEMS IN SOVEREIGN DEBT RESTRUCTURING, 2 (September 2, 2014), available at <http://www.imf.org/external/np/pp/eng/2014/090214.pdf>.

¹⁵¹ *Id.*

affected.¹⁵² In response, Kazakhstan has already incorporated these suggestions into its newest debt issuance.¹⁵³

The IMF's proposed CAC aggregation provision would help to ensure that entities are unable to strategically buy issuances on the secondary market with the hope of securing the right to hold out and pursue alternative debt collection strategies. However, even with such an aggregation provision in place, vulture funds could still overwhelm countries with smaller amounts in default by buying significant portions of the sovereign debt in default and overwhelming any CAC provisions anyway.

B. Novel Approaches to Restructuring

One potential approach to restructuring would be to impose a universal haircut across all of the defaulted debt issuances. While this approach has not been implemented by any country since the 1950s, universal haircuts across all of a country's bonds in default would circumvent many of the issues that creditors litigate over.¹⁵⁴ Equal principal and interest reductions across all creditors would avoid issues with negative pledges and *pari passu* clauses because the reduction would be structured so that all of the creditors are on equal footing. Equal treatment would also avoid one of the main issues with CACs, the threat that creditors will buy out certain issuances in order to obtain a sufficient amount to prevent the CAC from being triggered.

This strategy would allow a debtor nation to deal with all of its creditors at once, rather than suffer through a long, drawn-out process as was seen with Argentina, a process that ultimately harms domestic growth and investment. A swifter restructuring process has real value. Due to the time value of money, investors may be willing to take a marginally larger haircut on the principal if they can be assured a payout in a shorter time horizon because this amount is greater in present value than a larger payout after years of litigation.

While there has not yet been a fully litigated claim on whether a bond exchange could be challenged on the grounds that it constitutes expropriation, this may not represent a very promising strategy. Arguably, the bondholders would be entitled only to just compensation, which in this scenario would likely

¹⁵² *Id.* at 30.

¹⁵³ Ian Talley, *IMF Proposes Changes to Government Bond Contracts*, THE WALL STREET JOURNAL (Oct. 6, 2014), available at <http://www.wsj.com/articles/imf-proposes-changes-to-government-bond-contracts-1412609053>.

¹⁵⁴ See, for example, Jurgen Kaiser & Tim Jones, *Grenada's Proposed Debt Deal Could Have Implications for Billions of People*, THE GUARDIAN (July 1, 2013), available at <http://www.theguardian.com/global-development/poverty-matters/2013/jul/01/grenada-debt-relief-caribbean>.

be the amount the bond is trading for in the market. However, the debtor nation might be incentivized to offer a bond exchange that is at a premium to what the bonds are trading at in the secondary markets in order to facilitate a quick and orderly restructuring process. This could induce private creditors to participate in an exchange, rather than sell their bonds to a vulture fund. Because these creditors would expect fair market value of the debt, adjusted by the chance of success, if they pursue international arbitration or litigation, the expected payouts would not be worth the cost and uncertainty of the suit.

C. Sovereign Debt Restructuring Mechanisms in Conjunction with the U.N.

To facilitate a more orderly restructuring process, economists and legal scholars have called for an SDRM that would operate as an international bankruptcy tribunal where parties could adjudicate their claims on defaulted sovereign debt.¹⁵⁵ As Joseph Stiglitz noted, developed countries have a strong bankruptcy regime to resolve debt disputes that “cannot be left to unfettered bankruptcy” because they could undermine a fair and efficient restructuring process.¹⁵⁶ In the international sphere, scholars and institutions called for an IMF-led SDRM, but this mechanism was never fully developed.¹⁵⁷ However, in response to the recent flurry of litigation in U.S. courts, foreign courts, and international arbitration forums, the U.N. General Assembly adopted a resolution “[t]owards the establishment of a multilateral legal framework for sovereign debt restructuring process.”¹⁵⁸ The U.N. Resolution passed with 124 votes in favor, 11 votes against, and 41 abstentions.¹⁵⁹ The Resolution was introduced and supported by developing nations and China, and opposed by the U.S. and nations that are active financial centers.¹⁶⁰

¹⁵⁵ See, for example, Joseph Stiglitz, *The World Needs a Sovereign Debt Restructuring Mechanism*, EMERGING MARKETS (Dec. 10, 2014), available at <http://www.emergingmarkets.org/Article/3389531/JOSEPH-STIGLITZ-The-world-needs-a-sovereign-debt-restructuring-mechanism.html>; Norton, *supra* note 11, at 308; Sean Hagan, *Designing a Legal Framework to Restructure Sovereign Debt*, 36 GEO. J. INT'L L. 299 (2005).

¹⁵⁶ Stiglitz, *supra* note 155.

¹⁵⁷ For more discussion on the contemplated IMF-led SDRM, see IMF, *Proposed Features of a Sovereign Debt Restructuring Mechanism*, (2003) available at <http://www.imf.org/external/np/pdr/sdrm/2003/021203.pdf>; Richard Euliss, *The Feasibility of the IMF's Sovereign Debt Restructuring Mechanism: An Alternative Statutory Approach to Mollify American Reservations*, 19 AM. U. INT'L L. REV. 107 (2003); Molly Ryan, Note, *Sovereign Bankruptcy: Why Now and Why Not In the IMF*, 82 FORDHAM L. REV. 2473 (2014).

¹⁵⁸ U.N. Resolution, *supra* note 20.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

The creditor nations' skepticism could ultimately undermine the viability of greater U.N. involvement. For example, a U.S. delegate stated that a statutory mechanism would likely increase economic uncertainty.¹⁶¹ At the same time, advocates argued that a more robust legal restructuring framework had the potential to advance goals of economic security and foster greater development.¹⁶² In light of increased activism by vulture funds, the delegate from Jamaica argued that the U.N. is an appropriate forum to consider sovereign debt restructuring in light of its role in fostering sustainable development because the private market has failed to address the externalities stemming from "unsustainable sovereign debt."¹⁶³

An international regime for sovereign bankruptcy is not without its own set of critics. A few notable examples aside, empirical studies have shown that coordination among private creditors in sovereign debt restructuring is not a significant problem in most cases.¹⁶⁴ In an effort to delay spillover effects of default, ranging from bank runs to macroeconomic contraction and the accompanying political ramifications, governments are prone to pursue risky initiatives rather than initiate restructuring at the socially optimal time.¹⁶⁵ A more robust international bankruptcy regime still may not be able to mitigate the political fallout associated with restructuring, and thus may not be enough to incentivize the leaders of debtor nations to engage in restructuring when they could preserve the most value for their countries.¹⁶⁶ Additionally, sovereign debt distress and restructuring is dominated by repeat players on both the creditor and debtor side.¹⁶⁷ Thus, while a SDRM offers the potential for a more structured and orderly restructuring process, the design must minimize these persisting concerns.

While it is still unclear what effect a U.N.-sponsored SDRM might have on sovereign debt issuances, progress on this initiative should be closely monitored. The drafters of the SDRM regime would need to be cognizant of the current regimes used for resolving holdout investor claims, including national courts and

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Anna Gelpern, *A Skeptic's Case for Sovereign Bankruptcy*, 50 Hous. L. Rev. 1095, 1102–03 (2013) (citing Ugo Panizza, Frederico Sturzenegger & Jeromin Zettelmeyer, *The Economics and Law of Sovereign Debt and Default*, 47 J. Econ. Lit. 651, 655–56, 671 (2009); Julian Schumacher, Christoph Trebesch & Henrik Enderlein, *Sovereign Defaults in Court: The Rise of Creditor Litigation 1976-2010*, at 2–3, 20 (Dec. 16, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189997).

¹⁶⁵ *Id.* at 1103–04.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1106.

international arbitration forums. If investors can select which forum to bring a suit in, they will file in the forum that they perceive to be the most creditor-friendly. The sophisticated vulture funds who will seek out the most creditor-friendly forum, while unsophisticated creditors who suffer similar injury may pursue claims in a less creditor-friendly venue.

VI. GRENADA'S SOVEREIGN DEBT CRISES

In order to understand how these various elements affect the sovereign debt restructuring process, it is helpful to examine the varied incentives at work in a contemporary case. As a country that has been involved in multiple restructurings recently, including discussions with the IMF and holdout litigation in the U.S., Grenada provides a useful case study to explore these greater themes.

A. Grenada's Sovereign Debt Crisis in 2005 and Subsequent Selective Default

Grenada is a small island nation of approximately 100,000 people with an economy largely dependent on tourism and commercial agriculture.¹⁶⁸ In 2004, Hurricane Ivan struck Grenada, destroying approximately 90 percent of the houses and devastating both the tourist industry and nutmeg crops, Grenada's chief agricultural export.¹⁶⁹ The hurricane's damage was approximately twice Grenada's GDP.¹⁷⁰

With this type of devastation, Grenada was unable to service its debt obligations, even though its most recent bond issuance had been trading above par in the secondary markets prior to the hurricane.¹⁷¹ Commercial creditors held a majority of Grenada's debt, with other governments holding 10 percent

¹⁶⁸ See *God v. Bondholders: Small, Debt-Ridden Countries Could Benefit from Divine Intervention*, THE ECONOMIST (Nov. 9, 2013), <http://www.economist.com/news/finance-and-economics/21589472-small-debt-ridden-countries-could-benefit-divine-intervention-god-v>.

¹⁶⁹ See Buchheit & Karpinski, *supra* note 9, at 227 (approximately 70 percent of the hotel rooms in Grenada were out of commission following Hurricane Ivan). See also U.S. DEPT. OF THE TREASURY, *Report to Congress on the International Monetary Fund's Loan to Grenada: A Report to Congress Consistent with Section 1501 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 2010*, 3 (2014), available at <http://www.treasury.gov/resource-center/international/int-monetary-fund/Documents/7-8-2014%20Enclosure%20-%20Report%20on%20IMF%20Loans%20to%20Grenada.pdf> [hereinafter TREASURY REPORT]. By some accounts, "the damage caused to Grenada by the storm imposed some of the most substantial economic costs of any storm on a Caribbean island country in history." *Id.*

¹⁷⁰ See Buchheit & Karpinski, *supra* note 9, at 227.

¹⁷¹ See *id.*

and multilateral creditors, including the Caribbean Development Bank and the World Bank, the remaining 20 percent.¹⁷²

Grenada restructured approximately 94 percent of its outstanding debt.¹⁷³ It rescheduled its obligations with creditor countries, including the U.S., the U.K., Belgium, and France through the Paris Club (the dominant forum for creditor countries to renegotiate sovereign debt obligations).¹⁷⁴ This exchange offer with the bilateral creditors only affected the coupon structure and maturity dates of the old debt and imposed no "principal haircuts."¹⁷⁵ With private creditors, Grenada negotiated for a new series of bonds, set to mature in 2025 ("2025 Bonds"), which contained a graduated coupon structure.¹⁷⁶

Just as Grenada began to recover from natural disasters, the global financial crisis destabilized the tourism sector, sending the economy into contraction.¹⁷⁷ Facing a considerable increase in the coupon rate on its sovereign debt from the prior restructuring, a growing current account deficit, high unemployment, and public debt that was greater than its GDP, Grenada defaulted on payments for certain bond issuances in March 2013.¹⁷⁸

In addressing the issue of the selective default, the government of Grenada and other interested groups explored several potential solutions. One proposal was for an independent body, such as the IMF, to assess the sustainability of the debt and implement a write-off of two thirds of Grenada's debt using the traditional Christian rhetoric of a "jubilee."¹⁷⁹ Because no country has

¹⁷² *Id.* at 228. Grenada's commercial debt included five bond issues in Eastern Caribbean dollars, five bond issues in U.S. dollars, commercial bank loans and overdraft lines, obligations to the local social security system, treasury bills, and government guarantees of construction projects. Unlike other nations experiencing financial crisis, "Grenada would have to face the practical and inter-creditor issues raised by the need to restructure a heterogeneous debt stock." *Id.*

¹⁷³ Tsang, *supra* note 128, at 5; *see also* Grenada Debt Exchange Offering Memorandum *supra* note 26.

¹⁷⁴ *See* Tsang, *supra* note 128, at 6, n.13 ("The Paris Club is a voluntary, informal group creditor nations, which provides debt relief to indebted countries. The Paris Club is the major forum where creditor countries renegotiate official sector debts. . . . The Paris Club includes the United States and 18 other permanent members . . . Other creditors are allowed to participate in negotiations on an ad-hoc basis."). *See also* MARTIN A. WEISS, CONG. RESEARCH SERV., RS21482, THE PARIS CLUB AND INTERNATIONAL DEBT RELIEF 1 (2012).

¹⁷⁵ *See* Buchheit & Karpinski, *supra* note 9, at 229.

¹⁷⁶ *Id.*

¹⁷⁷ *See* TREASURY REPORT, *supra* note 169, at 3; IMF, STAFF REPORT FOR THE 2014 ARTICLE IV CONSULTATION AND REQUEST FOR AN EXTENDED CREDIT FACILITY ARRANGEMENT, 4 (2014), available at <http://www.imf.org/external/pubs/ft/scr/2014/cr14196.pdf> [hereinafter IMF Staff Report]; Jurgen Kaiser & Tim Jones, *supra* note 154.

¹⁷⁸ *See* Kaiser & Jones, *supra* note 154.

¹⁷⁹ *God v Bondholders*, *supra* note 168 ("[e]ver since the government defaulted on its dollar bonds in March, churchmen have called for a write-off of two-thirds of its debt, using the term 'jubilee' in

successfully implemented a universal reduction across all of its defaulted debt since Germany's restructuring in 1953, this proposal was highly controversial in the greater international community.¹⁸⁰

The government put forth two options for restructuring its bonds due in 2025.¹⁸¹ The first option provided a 60 percent reduction in face value, with principal repayments in equal, semiannual installments.¹⁸² This option also pushed back the maturity date; the first payment would take place on November 30, 2014, and the final payment would take place on May 30, 2029.¹⁸³ The second option was an issuance that would involve a 50 percent reduction in face value, with principal repayments in increasing semi-annual installments.¹⁸⁴ Under this second scenario, the first interest payment would start on November 30, 2014, the first principal payment would begin on November 30, 2016, and the date of maturity would be May 30, 2034. Interest would be a constant five percent throughout the life of the bonds.¹⁸⁵

In order to restore debt sustainability, restore sound fiscal practices, and stimulate private sector growth, Grenada worked with the IMF to create a plan for the sovereign debt restructuring process.¹⁸⁶ On June 26, 2014, the IMF Executive Board approved a three-year extended credit facility valued at approximately \$21 million USD.¹⁸⁷ As the program progresses, a committee comprised of Grenadian citizens and the Eastern Caribbean Central Bank (ECCB) will monitor performance and support implementation efforts.¹⁸⁸

The restructuring process is ongoing. For foreign private creditors, Grenada continues to work towards a formal offer for the 2025 bonds.¹⁸⁹ The IMF reports that “[g]ood faith discussions with the creditor committee

its Christian sense, meaning a one-off forgiveness of sins.”); see also Kaiser & Jones, *supra* note 177.

¹⁸⁰ See Kaiser & Jones, *supra* note 154.

¹⁸¹ See Government of Grenada, *EC\$ Notes due 2025: Indicative Restructuring Options*, available at http://www.gov.gd/egov/pdf/ec_notes_indicative_restructurin_options.pdf.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Press Release No. 14/103, IMF Mission Reaches Staff-Level Agreement with Grenada on an Economic Program under the Extended Credit Facility, IMF (Mar. 14, 2014), available at <https://www.imf.org/external/np/sec/pr/2014/pr14103.htm>.

¹⁸⁷ IMF Country Report No. 14/363, First Review Under the Extended Credit Facility Arrangement and Financing Assurances Review—Staff Report; Press Release, 1 (Dec. 2014), available at <http://www.imf.org/external/pubs/ft/scr/2014/cr14363.pdf>.

¹⁸⁸ *Id.* at 4.

¹⁸⁹ See *id.*

representing the majority of creditors for the bonds are intensifying, with both sides committed to reaching a solution that is both firmly sustainable and amicable.”¹⁹⁰ These negotiations parallel discussions with Grenada's domestic private creditors.¹⁹¹

In evaluating the IMF proposed program, the U.S. Department of the Treasury concluded that the IMF program and restructuring would provide the best opportunity to return to a sustainable debt path due to structural safeguards.¹⁹² However, when Standard & Poor's (S&P) rated Grenada as being in “selective default,” it noted that Grenada's political institutions and debt management capacity were weak and that this likely would result in a prolonged debt restructuring process.¹⁹³

It is important to understand the structure of the initial restructuring negotiations, including the IMF's role in these discussions. These discussions are the precursor to any holdouts' negotiations for advantageous terms, and pursuing full repayment through litigation or international arbitration if the initial negotiations prove unsuccessful. Parties bargain in the shadow of the law, and effective negotiation initially could minimize holdout litigation or international arbitration later.

B. Grenada's BITs

Grenada is party to two BITs, one with the U.K. and one with the U.S., meaning that Grenada could potentially end up in international arbitration with a group of holdout creditors.¹⁹⁴ The BIT with the U.K. contains the following elements relevant to a potential sovereign debt restructuring dispute: an expropriation clause,¹⁹⁵ a national treatment and most-favored nation clause,¹⁹⁶

¹⁹⁰ *Id.*

¹⁹¹ *See id.*

¹⁹² *See* TREASURY REPORT, *supra* note 169, at 5.

¹⁹³ *See, Argentina Default may Negatively Affect Grenada*, CARIBBEAN NEWS NOW (Aug. 1, 2014), <https://www.linkedin.com/pulse/20140801131908-128451942-argentina-default-may-negatively-affect-grenada>.

¹⁹⁴ *See* Government of Grenada, *Trade Agreements*, available at <http://www.grenadaworld.com/InvestorsGuide/TradeAgreements/tabid/109/Default.aspx> (last visited Mar. 27, 2014) [hereinafter *Trade Agreements*]; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Grenada for the Promotion and Protection of Investments, Treaty Series No. 33 (Feb. 25, 1988), available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1486> [hereinafter U.K.-Grenada BIT]; Treaty between the United States of America and Grenada Concerning the Reciprocal Encouragement and Protection of Investment, 71-318 Washington: 1986, March 3, 1989, available at <http://investmentpolicyhub.unctad.org/IIA/country/83/treaty/1825> [hereinafter U.S.-Grenada BIT].

¹⁹⁵ U.K.-Grenada BIT, *supra* note 194, art. V.

and access to independent settlement of investor disputes.¹⁹⁷ The BIT with the U.S. contains similar clauses, including: an expropriation clause,¹⁹⁸ a most-favored nation clause,¹⁹⁹ and provisions for the settlement of investment disputes in ICSID.²⁰⁰ To date, no creditors bound by a BIT with the U.S. or U.K. have brought claims to the ICSID tribunal over Grenada's sovereign debt restructuring efforts.

VII. CONCLUSION

In all likelihood, Grenada will continue to pursue discussions with its creditors and reach an amenable restructuring outcome. Following the recent disputes concerning the Argentinian sovereign debt restructuring, the future payoffs for holding out as a private investor remain uncertain. While the recent ICSID decisions have opened the tribunal up to investment disputes arising from sovereign debt restructuring, there has also been increased litigation in U.S. courts. It is still not entirely clear which course of action will be most attractive to holdout investors, and consequently, provide the greatest threat to an effective resolution for Grenada.

While holdout litigation may appear to be a viable alternative to international arbitration, evidence suggests that litigation is not often pursued. According to a recent study, "[l]itigation was a factor in only 29 of the 180 sovereign debt restructuring episodes involving private creditors between 1976 and 2010."²⁰¹ Thus, it is possible that the creditors will reach an orderly and efficient resolution of the sovereign debt restructuring, given the costs and uncertainty of litigation or international arbitration. Additionally, it is also possible that the more favorable public perception of Grenada may also keep the island country from becoming embroiled in a prolonged dispute with holdout creditors. Grenada's default was due to unforeseen natural disasters, rather than by a chronic mismanagement of finances, as has been the case in other sovereign debt crises. Although vulture funds may not be persuaded by Grenada's conduct leading up to its default, as other bilateral creditors might be, notions of fairness and equity often underpin many of the rulings in both

¹⁹⁶ *Id.* at art. III.

¹⁹⁷ *Id.*; see also *Trade Agreements*, *supra* note 194.

¹⁹⁸ U.S.-Grenada BIT, *supra* note 194, art. III(1).

¹⁹⁹ *Id.* at art. II(2) (stating that investments shall at all times be "accorded fair and equitable treatment.").

²⁰⁰ *Id.* at art. VI.

²⁰¹ Gelpern, *supra* note 28, at 3 (citations omitted).

international arbitration and litigation.²⁰² Thus, this conduct might weigh heavily in the expected payouts litigation and international arbitration.

The effect of ICSID's increased involvement in sovereign debt restructuring disputes may be mitigated by trends toward multilateral investment agreements, rather than BITs.²⁰³ Many countries are discussing or drafting regional investment agreements. These contemplated multilateral agreements could potentially augment or even supersede BITs.²⁰⁴ In light of the fact that the ICSID tribunals do not create precedent analogous to common law systems, standardization of clauses for multilateral investment agreements could provide more certainty for creditors who elect to pursue arbitration because there is less possibility for varied interpretations of the same clause. As a result, there would be less ambiguity embedded in the contractual terms, and the markets would be able to more adequately allocate the risk accordingly.

A clear solution for the efficient resolution of sovereign debt disputes is to minimize the ambiguity within the contractual provisions of the bonds, thereby enabling the market to efficiently price the risk of the bonds (all terms included). However, this ambiguity cannot effectively be eliminated until it has been interpreted by the tribunals with jurisdiction over potential disputes. Going forward, the ICSID is still well placed to interpret these provisions rather than national courts. However, creditors are incentivized to go forum-shopping for the jurisdiction that yields the highest expected payout. While this could minimize the role of the ICSID, (depending on whether its decisions are deemed to be pro-creditor or pro-debtor) with more disputes the ICSID would issue more opinions, creating more certainty in the marketplace for these contractual provisions.

Recent trends in international arbitration and litigation have changed the status quo. Creditors have unprecedented access to mechanisms for redress, and with the advent of a designated SDRM, this trend could be extended even further. While greater access to forums has contributed to the rise of vulture funds, further development of SDRMs could ultimately eliminate the arbitrage opportunities for these hedge funds. Multilateral investment agreements will also yield greater standardization of common treaty terms, allowing for more certainty in the markets regarding risk allocation.

²⁰² See, for example, *Abaclat*, ICSID Case No. ARB/07/5 at ¶ 579 (“[t]he system put in place . . . is a system aimed at providing the disputing parties with a fair and efficient dispute settlement mechanism.”).

²⁰³ Margie-Lys Jaime, *Relying Upon Parties' Interpretation in Treaty-Based Investor-State Dispute Settlement: Filling the Gaps in International Investment Agreements*, 46 GEO. J. INT'L L. 261, 263–64 (2014).

²⁰⁴ *Id.*

These reforms may ultimately help debtor nations as well. While foreign creditors investing in sovereign debt may have historically been at the mercy of the sovereign debtor, these countries are repeat players in the sovereign debt markets. Aggressive haircuts on exchange offers may save money in the short run, but will ultimately raise the country's cost of borrowing the next time it seeks funds through a sovereign bond issuance. Investors will require a deeper discount up front in exchange for lending money to countries with a history of pursuing such aggressive restructuring strategies. To the extent that these recent trends encourage debtors to better manage the exchange offer process and effectively deal with holdout problems, they should result in a lower cost of capital due to the lesser uncertainty surrounding default and redress. A lower risk premium has real implications—as the more efficient allocation of capital can result in greater investment in the social, infrastructure, and defense programs that are funded by sovereign debt.